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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 1318.

CLABER DISTRIBUTING COMPANY,
Appellant,

vs.

RUBBERMAID, INC.,
Appellee.

MOTION TO DISMISS OR AFFIRM.

On Appeal From the Supreme Court of the State of Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1310.

CLABER DISTRIBUTING COMPANY,

Appellant,

vs.

RUBBERMAID, INC.,

Appellee.

MOTION TO DISMISS OR AFFIRM

On Appeal From the Supreme Court of the State of Ohio.

Rubbermaid, Inc., appellee, hereby moves, pursuant to Rule 16, to:

(1) dismiss this appeal on the grounds (a) that the appeal does not present a substantial federal question; (b) that any federal question sought to be reviewed was not timely or properly raised, or expressly passed on by the Supreme Court of Ohio; and (c) the judgment of the Supreme Court of Ohio rests on an adequate non-federal basis; and

(2) in the alternative, if federal questions are deemed to exist, to affirm the judgment of the Supreme Court of Ohio on the ground that such federal questions are so well settled and unsubstantial as not to require further argument.

STATEMENT.

This case, reduced to the elemental terms which befit its limited and parochial nature, is an action under the Ohio Fair Trade Law, Ohio Revised Code, Sections 1333.27 through 1333.34. The basic constitutionality of the Ohio Fair Trade Law was affirmed in 1963 by the Ohio Supreme Court. *Hudson Distributor's Inc. v. The Upjohn Co.*, 174 Ohio St. 487 (1963) (later in turn affirmed by the Supreme Court of the United States at 377 U. S. 386, 84 S. Ct. 1273). Promptly thereafter Rubbermaid filed the present action.

Plaintiff-appellee Rubbermaid, Inc. sought to enjoin defendant-appellant Claber Distributing Company of Cleveland, Inc. from selling Rubbermaid's fair traded products at prices approximately 33⅓ per cent below Rubbermaid's established fair trade prices. Rubbermaid also requested an allowance of costs, including reasonable attorney fees, as provided in Section 1333.32(B), Ohio Revised Code.

Much of the procedural history, not completely recounted in appellant's Jurisdictional Statement, is presently irrelevant. Initially the trial court granted Rubbermaid an injunction, conditioned on the cessation by The May Company, a non-party but a presumed competitor of Claber, of the practice of giving one additional trading stamp per ten cents on cash purchases of Rubbermaid's fair traded products on Tuesdays. On the question of attorney fees, the trial court upheld the statute but denied Rubbermaid its recovery on the subjective ground that Claber's bad faith in conducting its defense had not been shown. Appellant's Appendix, p. 1a.

The condition attached to the injunction was premised on the trial court's conclusion that The May Company's "double stamp" practice was a violation of the Ohio

Fair Trade Law. Rubbermaid promptly sued The May Company; the case was removed by The May Company to the United States District Court for the Northern District of Ohio; the district court in due course ruled that the "double stamp" practice was *not* a violation of the Ohio Fair Trade Law; and the suit against The May Company was thereupon dismissed.[1]

In the present suit against Claber the trial court then dissolved the conditional injunction, solely on the ground that Rubbermaid, having failed to stop The May Company's "double stamp" practice, had not diligently and fairly enforced its fair trade program. Appellant's Appendix, p. 4a.

Rubbermaid thereupon appealed to the Court of Appeals of Cuyahoga County, assigning as errors (a) the trial court's construction of the Ohio Fair Trade Law as it pertained to trading stamps and (b) the trial court's application of a subjective test of "bad faith" to the provision for statutory attorney fees. Appellee's Appendix, p. 16.

[Claber Distributing also appealed from the trial court's judgment for dismissing its various defenses, other than the trading stamp question. Claber based its appeal on the ground that the Ohio Fair Trade Law violated the *Ohio* Constitution. Appellee's Appendix, p. 17. This appeal was later voluntarily abandoned by Claber, and its appeal was thereupon dismissed. Appellee's Appendix, p. 18.]

The Court of Appeals, acting on Rubbermaid's appeal, reversed the trial court. On the issue of diligent enforcement, the Court of Appeals held that The May Company's

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[1] The history of this litigation as it involved the separate suit against The May Company is recounted in the opinion of the Court of Appeals. Appellant's Appendix, pp. 41a-46a.

"double stamp" practice was *not* a violation of the Ohio Fair Trade Law and, Rubbermaid's enforcement program having been otherwise perfect, that Rubbermaid was entitled as a matter of law to a permanent injunction against Claber's continuing violations. On the issue of statutory attorney fees, the Court of Appeals rejected Claber's contention that the statute was invalid and directed the trial court to determine and allow Rubbermaid its costs, including reasonable attorney fees. Appellant's Appendix, pp. 46a-47a.

Claber noticed an appeal to the Supreme Court of Ohio and also moved the Court for an order directing the Court of Appeals to certify its record. The Supreme Court of Ohio overruled the motion to certify and dismissed the appeal as of right "for the reason that no substantial constitutional question exists herein." Appellant's Appendix, p. 48a. A subsequent motion for rehearing was likewise denied. Appellant's Appendix, p. 49a.

It is on this state of the record that Claber now claims to have drawn into question the validity of the Ohio Fair Trade Law under the due process and equal protection clauses of the Fourteenth Amendment.

ARGUMENT.

I. There is no substantial federal question presented by this appeal, and none was properly raised in or expressly passed on by the Supreme Court of Ohio.

The premise of Claber's appeal to this Court must necessarily be that jurisdiction under 28 USC Section 1257(2) arises because Section 1333.32(B) of the Ohio Fair Trade Law violates the Fourteenth Amendment. This is Claber's Question 1 at page 6 of its Jurisdictional Statement; and this question is dealt with in a dozen paragraphs of argument commencing at page 14.

Reserving Question 1 for the moment, the remaining six of Claber's "Questions Presented" are merely restatements of strictly parochial issues, on their face devoid of any federal question or basis for review under Section 1257(2). Thus Questions 2, 4, 5, 6, and 7 restate the usual "defenses" in a state fair trade case of a discriminatory price structure, lack of enforcement, abandonment of the fair trade program and generalized inequity. All of these defenses involve the application of Ohio's Fair Trade Law, as interpreted by its courts, to the particularized facts of this case.

For example, the trial court found the facts against Claber on the "defenses" it now poses as Questions 2, 6 and 7 and in favor of Claber on its Questions 4 and 5. The Court of Appeals reversed the trial court's interpretation of Ohio law on Questions 4 and 5 and in effect affirmed the trial court on Questions 2, 6, and 7. At no time were these issues cast in terms which would warrant jurisdiction being assumed by the Supreme Court of the United States under 28 USC Section 1257(2): they were treated by Claber and by the Ohio courts, properly we believe, as purely state issues, not involving any federal question.

In a recasting of Question 2, Claber at page 13 and again at page 18 strains to extract a federal question out of what it characterizes as "discriminatory allowances" to claimed competitors; and Claber tries to smooth the argument's path by asserting that its "defense" was "ignored" or at least "overlooked" by the trial court.

There are multiple responses, each fatal to this asserted basis for Supreme Court jurisdiction:

(a) The trial court did not "ignore" the "discriminatory allowance" defense, it found expressly against Claber on both the facts and the law. Appellant's Appendix, pp. 25a-28a.

(b) The trial court did not "overlook" these Robinson-Patman claims of Claber, it ruled explicitly and correctly against them. Appellant's Appendix, p. 9a.

(c) Claber appealed from the ruling rejecting its claimed defense, based that appeal on Ohio Constitutional grounds *only*, then dismissed its own appeal and had a final and unappealed judgment entered against it. Appellee's Appendix, p. 18.

(d) When Rubbermaid instituted its own limited appeal from the trial court, Claber filed no cross appeal from the rejection of its defenses; and the single assignment of error by Claber in Rubbermaid's appeal was limited to the contention that the Ohio Fair Trade Law was unconstitutional under the *Ohio* Constitution, the same limited, non-federal ground previously abandoned and dismissed in Claber's own appeal. Appellee's Appendix, p. 19.

(e) Even assuming Claber had properly preserved federal questions for the present appeal, the claim in a fair trade action that there is a technical or even actual violation of the Robinson-Patman Act is, under long established precedent, an insufficient defense. *Bruce's Juices v.*

American Can Co., 330 U.S. 743, 67 S. Ct. 1015 (1947); *Carter Products, Inc. v. The Riteprice Merchandise, Inc.*, 23 N.Y. Misc. 2nd 230 (1960); *Esterbrook Pen Company v. San Juan F. Villarino 5 y 10, Inc.*, 144 F. Supp. 309 (D.C.P.R. 1956).

(f) And even if the claimed Robinson-Patman violation were cognizable in a fair trade case, Claber's appeal would fail in this instance since the trial court found no unreasonableness in Rubbermaid's price structure. Appellant's Appendix, pp. 9a, 27a. See *Lionel Corp. v. Klein*, 114 A. 2d 652, 1955 CCH Trade Cases, ¶ 68,085 (Del. 1955); *General Electric Co. v. S. Klein-on-the Square, Inc.*, 129 N.Y.L.J. 583, 1952-53 CCH Trade Cases, ¶ 67,443 (Sup. Ct. N.Y. 1953); and *General Electric Co. v. Veeds Television and Appliances Co., Inc.*, 129 N.Y.S. 2d 278, 1954 CCH Trade Cases, ¶ 67,672 (Sup. Ct. N.Y. 1954).

Question 3 is slightly different in focusing on the ruling of the Cuyahoga County Court of Appeals rather than the events in the trial court; and there is in Question 3 a somewhat mystic reference to the United States Constitution. Claber's contention now is that the Court of Appeals could not properly reverse its trial court without an explicit finding of "abuse of discretion." Claber did not argue, on its attempted appeal to the Supreme Court of Ohio, that the Fourteenth Amendment was involved—that idea gets injected for the first time in Question 3.

The contention in the state court was that, under Ohio law, a reviewing court ought not to disturb an equity ruling without explicitly and expressly finding an "abuse of discretion." Rubbermaid, on the other hand, pointed out that it is specious to assert that a particular form of words in a journal entry is necessary to support a reversal, particularly where the words "prejudicial error," as used by

the Court of Appeals, include, in Ohio, "abuse of discretion" and any other error the trial court may have committed. *Cieslikowski v. Radecki*, 100 Ohio App. 46, 135 N.E. 2d 433 (Lucas County 1955). And Claber is equally wrong in assuming that under the circumstances of this case there was any need to find an abuse of discretion by the trial court: the reversal was for an error of law in construing the Ohio Fair Trade Law and once this was remedied by the Court of Appeals there was nothing required of the trial court other than the entry of a permanent injunction and determination of costs.

Thus, with the possible exception of statutory attorneys fees, there is no foundation in the record, and really not much of a pretense in appellant's Jurisdictional Statement, to demonstrate that necessary criteria are present to support jurisdiction of this appeal. The applicable criteria are well stated in *Williams v. Kaiser, Warden*, 323 U. S. 471, 477-478, 65 S. Ct. 363 (1945):

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction and that its decision of the federal question was necessary for its determination of the cause. *Honeyman v. Hanan*, 300 U. S. 14, 18; *Lynch v. New York*, 293 U. S. 52. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. *Klinger v. Missouri*, 13 Wall. 257, 263; *Wood Mowing & Reaping Machine Co. v. Skinner*, 139 U. S. 293, 297; *Allen v. Arguimbau*, 198 U. S. 149, 154-155; *Lynch v. New York, supra.*"

See also *Durley v. Mayo*, 351 U. S. 277, 281, 76 S. Ct. 806 (1955), rehearing denied, 352 U. S. 859, 77 S. Ct. 22;

Bell v. State of Maryland, 378 U. S. 226, 84 S. Ct. 1814 (1964).

These principles have added weight where, as here, the highest court of a state delivers no opinion and its judgment might have rested on a non-federal ground, such as failure to raise a federal issue in a lower court. *Stembridge v. Georgia*, 343 U. S. 541, 72 S. Ct. 834 (1952), and *Durley v. Mayo, supra*. See also *Scripto, Inc. v. Carson*, 362 U. S. 207, 80 S. Ct. 619 (1960). And the burden is on appellant to demonstrate that a federal question is necessarily presented. *Department of Mental Hygiene of Calif. v. Kirchner*, 380 U. S. 194, 197, 85 S. Ct. 871 (1965).

Virtually identical issues to those raised by Claber—including trading stamps—were resolved four square with the Ohio appellate rulings in *Gadol v. Dart Drug Corporation of Maryland*, 222 Md. 372, 161 A. 2d 122 (1960). The price cutting defendant then attempted to appeal as of right, just as Claber, and this Court dismissed for want of a substantial federal question. *Dart Drug Corp. of Md. v. Gadol*, 364 U. S. 444, 81 S. Ct. 236 (1960). There is no discernible basis for distinguishing this result from that urged by Rubbermaid on this appeal.

Indeed the only assertably "federal" issue extractable from Claber's Jurisdictional Statement is the claim that Section 1333.32(B), Ohio Revised Code, may violate the Fourteenth Amendment in permitting a successful plaintiff to recover "the costs of suit, including reasonable attorney fees." In view of Claber's initial appeal on Ohio grounds only, and the later voluntary dismissal (Appellee's Appendix, pp. 17-18), Rubbermaid has constantly challenged Claber's right to assert a federal issue in any of the appellate courts. It may be that the Ohio Supreme Court concurred and was not considering the federal question, in which event jurisdiction here should fail under the criteria discussed above.

Even if we disregard this possibility, no substantial federal question is here presented. The basic constitutionality of the Ohio Fair Trade Law has already been upheld by this Supreme Court in *Hudson Distributors, Inc. v. Eli Lilly Co.*, 377 U. S. 386, 84 S. Ct. 1273 (1964); and the constitutionality of the law for state purposes has since been reaffirmed by the Supreme Court of Ohio. *Olin Mathieson Chemical Corp. v. The Ontario Store of Price Hill, Ohio, Inc.*, 9 Ohio St. 2d 67 (1967); and *Olin Mathieson Chemical Corp., Winchester Western Division v. The Ontario Store of Toledo, Ohio, Inc.*, Vol. XL, Ohio Bar No. 18, p. 570 (1967). (The defendants in the last two cited cases were, like appellant Claber Distributing, subsidiaries of Cook Coffee Company, probably the largest volume retailer in Ohio.) Furthermore, the narrower issue of the federal constitutionality of a provision for recovery of attorney fees by a successful plaintiff is so well ingrained in federal law as to be beyond reasonable dispute. See authorities at pages 10-14, *infra*.

By reason of the foregoing multiple grounds existing under Rule 16, this appeal should be dismissed.

II. If federal questions are deemed properly raised by appellant, they are so well settled and unsubstantial as not to require further argument.

The only assertably federal question which Claber poses is whether it violates the equal protection clause for a state legislature, in furtherance of its public policy, to authorize recovery of reasonable attorney fees for successful plaintiffs without doing so for successful defendants. This is a constitutional issue which has been settled at least since *Missouri, Kansas & Texas Railway Company of Texas v. Cade*, 233 U. S. 642, 34 S. Ct. 678 (1914), which upheld a Texas statute authorizing attorney fees to

a successful plaintiff only. As Mr. Justice Pitney there said,

> "If the classification is otherwise reasonable, the mere fact that attorney's fees are allowed to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the 'equal protection' clause." 233 U. S. at 650.

This principle has since been followed by the Supreme Court without deviation. *Missouri, Kansas & Texas Railway Co. of Texas v. Harris*, 234 U. S. 412, 32 S. Ct. 790 (1914); *Missouri Pacific Railway Company v. Larabee*, 234 U. S. 459, 34 S. Ct. 979 (1914); *Meeker & Co. v. Lehigh Valley Railroad Co.*, 236 U. S. 412, 35 S. Ct. 328 (1915); and *Chicago & Northwestern Railway Company v. Nye Schneider Fowler Company*, 260 U. S. 35, 43 S. Ct. 55 (1922). See also *Newman v. Piggie Park Enterprises, Inc.*, ___ S. Ct. ___, 36 U. S. Law Week 4243 (1968), discussed *infra* at pp. 13-14. Numerous state courts—including the Supreme Court of Ohio—have accepted and applied this principle of constitutionality. *E.g.*, *Gomes v. Bristol Manufacturing Corporation*, 95 R. I. 126, 184 A. 2d 787 (1962); *DeWitt v. State ex rel. Crabbe*, 108 Ohio St. 513 (1923). See also *Symons v. Eichelberger*, 110 Ohio St. 224 (1924).

Claber ignores these established precedents[2] and blitheringly urges that Section 1333.32(B) creates an un-

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[2] Claber does cite some long obsolete or obviously inapplicable cases. *Gulf C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 17 S. Ct. 255 (1897) held a fee statute invalid for unreasonable classification in singling out railway companies as distinguished from other debtors, *not* because successful plaintiffs alone were benefited; and the statute was later amended accordingly and upheld by the United States Supreme Court in *Missouri, Kansas & Texas Railway Company of Texas v. Cade*, *supra* at page 10. Moreover, *Missouri Pacific Ry. Co. v. Tucker*, 230 U. S. 340, 33

(Continued on following page)

reasonable classification by making those defendants found guilty of price cutting on fair traded products accountable for the reasonable attorney fees incurred by the plaintiffs who successfully enforce the state fair trade policy. The classification—fair trading plaintiffs as against price cutting defendants—is made under direct Congressional sanction: Miller-Tydings Act, 15 U. S. C. § 1; McGuire Act, 15 U. S. C. § 45. Moreover, the right of Ohio to make this classification was specifically upheld in *Hudson Distributors Inc. v. Eli Lilly & Co.*, 377 U. S. 386, 84 S. Ct. 1273 (1964).

The Clayton Act provides a useful analogy in that attorney's fees are awarded under Section 4 only to successful plaintiffs in private actions. 15 U. S. C. § 15. The right of Congress to provide for the remedy of treble damages, costs and "reasonable attorney's fees" was explicitly upheld in *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U. S. 390, 27 S. Ct. 65 (1906).

It is well established that under the Clayton Act attorney's fees are awarded only to successful plaintiffs—not to successful defendants. *Gillam v. A. Shyman, Inc.*, 205 F. Supp. 534 (D. C. Alaska 1962). Indeed in *Byram Concretanks v. Warren Concrete Products Co. of N. J.*, 374 F. 2d 649 (3rd Cir. 1967), an award of attorney fees and

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(Continued from preceding page)

S. Ct. 961 (1913). struck down a liquidated damages statute as discriminatory and unreasonable—attorney fees were neither discussed nor in issue. Finally, Claber mentions *Coal Company v. Rosser*, 53 Ohio St. 12, 41 N. E. 263 (1895) where the inherent defect was the unequal and arbitrary treatment of members of the same class, not the fact of a statutory prescribed fee; and this case has for present purposes been effectively discarded by *DeWitt v. State ex rel. Crabbe*, 108 Ohio St. 513 (1923); and see *State ex rel. Mecartney v. Hummel*, 52 Ohio L. Abs. 55 (Franklin County 1948). Rubbermaid's views on these constitutional issues are also supported by the opinion of the trial court and the rulings of the Court of Appeals and Ohio Supreme Court below.

costs to a defendant was reversed "even though plaintiff's suit was baseless." The Third Circuit's rationale, unusually apt in the present context, appears at 374 F. 2d 651:

> "Our conclusion is based on policy considerations reflected in the Clayton Act. It is well known that a primary object of the private treble damage suit is to provide a means for the enforcement of the anti-trust laws in addition to Government prosecutions. The incentive which the prospect of treble damages provides for instituting private anti-trust actions would be dampened by the threat of assessment of defendant's attorney's fees and other costs as a penalty for failure."

This policy basis for a classification in favor of successful plaintiffs is even more urgent in the case of state fair trade laws where the entire burden of enforcement falls on private plaintiffs and a failure to enforce with diligence results in destruction of their fair trade program.

The most recent policy statement, directly analogous to Ohio's decision to entrust fair trade enforcement to private litigants, occurred this Term of Court in *Newman v. Piggie Park Enterprises, Inc.*, __ S. Ct. __, 36 U. S. Law Week 4243 (1968):

> "* * * If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II." 36 U. S. Law Week at 4244.

The Fourth Circuit in *Newman* had applied a subjective test of "bad faith" to the applicable statute, just as

the trial court did in the first instance herein. The Court of Appeals, and in turn the Supreme Court of Ohio, rejected this standard in favor of a direct application of the statute, just as the United States Supreme Court did in *Newman*. While fair trade does not occupy the same priority plane as the Civil Rights Act, the federal question for present purposes is the same. The announced public policy of Ohio, as expressed in its Fair Trade Law, is to encourage fair trading of quality, trademarked merchandise. To carry out this policy, the law authorizes private enforcement and permits a successful plaintiff the recovery of reasonable attorney fees.

It certainly creates no federal issue for Claber, of all persons, to cry inequity. This defendant willfully, flagrantly and continuously cut the fair trade prices of plaintiff's products by 33⅓ per cent—in direct, substantial and knowing violation of the state's policy of encouraging fair trade; it chose to defy the state's fair trade policy; and it sought to destroy plaintiff's fair trade program rather than sell products of another manufacturer with which plaintiff's products were in free and open competition.

The policy of the Ohio legislature is thus clear. The statutory remedy is explicit. The classification between fair trading plaintiffs and price cutting defendants is reasonable and well within established precedents, including the Clayton, Miller-Tydings and McGuire Acts and the policy statements of this Supreme Court from *Cade* in 1914 through *Newman* in 1968.

Any federal questions sought to be raised by appellant herein are so well settled and unsubstantial as not to warrant further argument. The decision below should be affirmed.

CONCLUSION.

For the foregoing reasons, appellant's appeal should be dismissed or, in the alternative, the judgment of the Supreme Court of Ohio upholding the prior judgment of the Court of Appeals of Cuyahoga County should be affirmed.

Respectfully submitted,

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APPENDIX.

ASSIGNMENT OF ERROR IN COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT OF OHIO, CUYAHOGA COUNTY, FILED BY RUBBERMAID, INC., PLAINTIFF-APPELLANT IN SAID COURT OF APPEALS.

The judgment of the Court of Common Pleas of Cuyahoga County, cancelling and denying an injunction granted to plaintiff against defendant, and denying attorneys' fees to plaintiff, is contrary to law and should be reversed because of the following errors:

1. The Trial Court Erred in Holding that Plaintiff Had Not Diligently and Fairly Enforced Its Fair Trade Program.

A. The Trial Court Erred in Concluding that The May Company's Practice of Giving One Additional Trading Stamp Per 10 Cents on Cash Purchases on Tuesday Violates The Ohio Fair Trade Law.

B. The Trial Court Erred in Conditioning Plaintiff's Right to an Injunction Against Defendant Upon the Cessation of The May Company's Practice.

C. The Trial Court Erred in Not Making The Injunction Absolute After the Plaintiff Filed and Prosecuted an Action to Enjoin The May Company's Practice, and After a Court of Competent Jurisdiction Refused to Follow the Trial Court in This Case and Refused to Hold That The May Company's Practice Violated the Ohio Fair Trade Law.

2. The Trial Court Erred in Holding That Plaintiff Was Not Entitled to Recover Statutory Attorney Fees.

A. The Public Policy of This State Requires That Attorney Fees Be Awarded in a Fair Trade Case When the Plaintiff Prevails.

B. If There Is Discretion to Award Attorney Fees, Then Such Discretion Should Have Been Exercised by the Trial Court so as to Award Attorney Fees to Plaintiff.

NOTICE BY CLABER DISTRIBUTING COMPANY OF CLEVELAND, INC. OF ITS APPEAL TO COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT OF OHIO, CUYAHOGA COUNTY.

The Defendant-appellant, Claber Distributing Company of Cleveland, Inc., hereby gives notice of appeal on questions of law to the Court of Appeals for the Eighth Judicial District of Ohio, Cuyahoga County, from the judgment and final order rendered against defendant on May 24, 1965, for the reason that Sections 1333.27 through 1333.34 of the Ohio Revised Code, upon which plaintiff-appellee's action is predicated, violate and contravene the provisions of the Ohio Constitution, and are therefore invalid.

METZENBAUM, GAINES, SCHWARTZ,
KRUPANSKY, FINLEY & STERN,
Attorneys for Defendant-Appellant.

Of Counsel:
ELMER I. SCHWARTZ,
DONALD M. ROBINER.

CERTIFICATE OF SERVICE.

A copy of the foregoing Notice of Appeal was mailed to Thompson, Hine and Flory, 1100 National City Bank Building, Cleveland, Ohio 44114 and to Critchfield, Critchfield, Critchfield, and Johnson, 146 East Liberty Street, Wooster, Ohio, Counsel of Record for plaintiff-appellee, this 12th day of June, 1965.

METZENBAUM, GAINES, SCHWARTZ,
KRUPANSKY, FINLEY & STERN,
Attorneys for Defendant-Appellant.

JOURNAL ENTRY OF THE COURT OF APPEALS DISMISSING NOTICE OF APPEAL BY CLABER DISTRIBUTING COMPANY OF CLEVELAND, INC.

Appeal dismissed by appellant at appellant's costs, for which judgment is rendered.

Ordered, that a special mandate be sent to said Court of Common Pleas, to carry this judgment into execution.

JOSEPH H. SILBERT, *Chief Justice.*

Dated—August 26, 1965.

ASSIGNMENT OF ERROR BY CLABER DISTRIBUTING COMPANY OF CLEVELAND, INC., DEFENDANT-APPELLEE IN THE COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT OF OHIO, CUYAHOGA COUNTY.

The Trial Court erred in overruling the demurrer of defendant, and the later motion of defendant, both made on the ground that plaintiff's amended petition fails to state facts which show a cause of action because §§ 1333.27 to 1333.34, Ohio Revised Code, upon which plaintiff's action was predicated, contravene the provisions of the Ohio Constitution and are therefore invalid.

ACT OF JULY 2, 1890, CHAP. 647, 26 STAT. 209, AS AMENDED BY ACT OF AUGUST 17, 1937, CHAP. 690, 50 STAT. 673; 15 U. S. C. § 1.

§ 1. (Sherman Act as amended by Miller-Tydings Act.)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to

intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

ACT OF JULY 14, 1952, CHAP. 745, 66 STAT. 631; 15 U. S. C. § 45 (McGUIRE ACT).

An Act to amend the Federal Trade Commission Act with respect to certain contracts and agreements which establish minimum or stipulated resale prices and which are extended by State law to persons who are not parties to such contracts and agreements, and for certain other purposes.

§ 45 (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements

prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which is substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum

or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

ACT OF OCTOBER 15, 1914, CHAP. 323, SEC. 4, 38 STAT. 731, 15 U. S. C. § 15 (CLAYTON ACT).

Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.